COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2921

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CHRISTOPHER BEAMAN,

PLAINTIFF-APPELLANT,

V.

BRUCE FISCHER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

DEININGER, J.[1] Christopher Beaman appeals a small claims judgment entered in his favor against Bruce Fischer. The trial court awarded Beaman $299 in compensatory and punitive damages after concluding that Fischer had intentionally inflicted emotional distress by swerving his log truck into an

[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

oncoming lane of traffic, forcing a vehicle in which Beaman was a passenger off of the highway. Beaman claims the trial court erred by awarding damages on the theory it did, instead of for assault, and that the court should have awarded a greater sum in punitive damages. We disagree and affirm.

BACKGROUND

Beaman filed a small claims summons and complaint alleging that Fischer had "purposefully and intentionally" driven his "fully loaded log truck" into an oncoming lane of traffic, which maneuver forced the driver of a pickup truck in which he was riding "onto the gravel and shoulder" of the highway.[2] He further alleged that "[a]lthough there was no contact between the vehicles[,] the traffic was heavy and I was in great fear and at serious risk of injury and even death." Beaman sought both compensatory and punitive damages, demanding judgment for $5,000, the small claims jurisdictional limit. Fischer filed a written answer denying the allegations.

At trial, Beaman's testimony and that of the driver of the pickup was consistent with the allegations in the complaint, while Fischer denied that he had swerved his log truck into oncoming traffic, intentionally or otherwise. At the close of the plaintiff's case, Fischer's counsel moved for dismissal, arguing that Beaman had failed to establish the elements of a claim for intentional infliction of emotional distress. In response, Beaman argued that his claim was for assault.

[2] The driver of the pickup truck, Kevin Gilmore, also sued Fischer on a similar claim in a separate action. The cases were consolidated for trial. The court found that Gilmore had not proven any compensatory damages but awarded him $200 in punitive damages. Gilmore also appealed the judgment in his favor, making arguments similar to those Beaman raises here. *See* ***Gilmore v. Fischer***, No. 98-2920, unpublished slip op. (Ct. App. March 4, 1999). No party requested that we consolidate the appeals.

The court ruled that "the facts that have been proven don't show assault here," but denied Fischer's motion because it concluded that Beaman had put in sufficient evidence of a claim for intentional infliction of emotional distress to survive a dismissal motion.

At the conclusion of the trial, the court resolved the liability issue in Beaman's favor, finding that Fischer "did come into their lane"; that his conduct was intentional, extreme and outrageous; and that Fischer's conduct had caused Beaman emotional distress. Because Beaman had not sought medical or psychiatric treatment, however, the court declined to award "any damages for extreme emotional distress" and found "that there wasn't a long-term disabling emotional response." Nonetheless, the court found that Beaman suffered "more than just temporary discomfort" which caused him to lose some work. Based on Beaman's testimony, the court awarded him $99 in compensation for fifteen hours of lost work at his wage rate of $6.60 per hour.

On the issue of punitive damages, Beaman's counsel simply stated that "I think the facts are there, Your Honor, for you to award punitive damages," but he did not request a specific amount or offer any argument on the claim, although the court invited him to do so.[3] The court awarded Beaman $200 in punitive damages "because of the outrageousness of the conduct here." Judgment was entered in Beaman's favor for $299 plus costs, and he appeals the judgment.

[3] Earlier in his closing argument, after the court had ruled that the case would proceed on an intentional infliction of emotional distress theory rather than assault, Beaman's counsel argued that an assault had occurred. The court reminded counsel that it had rejected that cause of action and told him, "If you bring it up again, it will be contempt of court." Thereafter, Beaman's counsel declined to offer further argument, although the court specifically invited him to address the claim of intentional infliction of emotional distress and the award of punitive damages.

ANALYSIS

Beaman first argues that the trial court erred "in ruling that the complaint in this case did not plead a cause of action for assault, thereby precluding [Beaman] any recovery under that cause of action." Beaman asserts in his reply brief that, had he been able to argue that Fischer committed an assault, he "would have been able to … within a reasonable possibility win his case. The Trial Court's Error precluded the plaintiff from asserting his strongest cause of action that of Assault." The principal difficulty with this claim of error is that Beaman did "win his case"—he prevailed on the issue of Fischer's liability. Beaman's claim survived a defense motion to dismiss at the close of his case, and the trial court ultimately resolved the liability issue in his favor.

Beaman does not explain why he would have recovered any greater damages had the trial court concluded that Fischer had assaulted him rather than intentionally inflicted emotional distress upon him. Beaman's compensatory damages were limited to $99 because the trial court concluded that he had not proven any damages beyond a loss of wages for fifteen hours of work, not because Beaman had not pled or proven a claim for an assault. The supreme court has noted that:

> The test of whether there is more than one cause of action is whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. This court has also described a cause of action "as an aggregate of operative facts giving rise to a right or rights ... which will be enforced by the courts."

Shelstad v. Cook, 77 Wis.2d 547, 556, 253 N.W.2d 517, 521 (1977) (citations omitted). Beaman's right to recover damages from Fischer was enforced by the court. Even if the trial court had concluded that Beaman had proven an assault instead of, or in addition to, an intentional infliction of emotional distress, his

recovery of compensation would have been no greater on the evidence he produced at trial. We therefore agree with Fischer that Beaman's first claim of error does not provide grounds for reversal. *See* § 805.18(2), STATS. ("No judgment shall be reversed or set aside … unless … the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment ….").

Beaman's second claim of error suffers from the same infirmity. He argues that the trial court erred "in failing to award punitive damages for the assault cause of action." Beaman, however, also prevailed on his claim for punitive damages. The trial court deemed Fischer's conduct outrageous and awarded Beaman punitive damages as a result. We fail to see how a determination that Fischer committed an outrageous assault would have benefited Beaman any more than the court's conclusion that Fischer had outrageously inflicted emotional distress. Punitive damages "depend on the nature of the wrongdoer's conduct, not on the nature of the tort on which compensatory damage is based." ***Wangen v. Ford Motor Co***., 97 Wis.2d 260, 275, 294 N.W.2d 437, 446 (1980).

Finally, Beaman contends that the trial court's award of $200 in punitive damages is not sufficient to deter Fischer from "attempting this sort of behavior in the future." He argues that the small claims jurisdictional maximum of $5,000 should be awarded in order to effect a sufficient deterrent. Fischer responds that Beaman has forfeited the right to challenge the punitive damages award on appeal by failing to make his present argument, or any other on the punitive damages issue, in the trial court. We agree. The amount of an award of punitive damages is within the discretion of the trier of fact. *See* ***Wangen***, 97 Wis.2d at 301, 294 N.W.2d at 458. A reviewing court will not find an erroneous exercise of discretion at the behest of a party who has failed to ask the trial court

to exercise its discretion. *See* ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 918 (Ct. App. 1983) (citation omitted).

Moreover, even if we were to review the punitive damages award, Beaman's final claim of error would likely fail. A plaintiff is not entitled to punitive damages as a matter of right, and the "amount awarded can never be unreasonably low." *See* ***Wangen***, 97 Wis.2d at 301-02, 294 N.W.2d at 458. We note as well that Beaman elicited no evidence at trial regarding Fischer's ability to pay. The trial court's assessment of $200 in punitive damages is roughly the equivalent of a civil forfeiture for disorderly conduct or a traffic offense, which are not altogether unrealistic comparisons for the conduct Fischer was found to have engaged in.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.